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No. 95-1193

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FRANK SARACO, *et al.*, and OTHER SIMILARLY SITUATED INDIVIDUALS,
Petitioners,
v.
THE UNITED STATES and GEORGE WEISE in his capacity as COMMISSIONER, UNITED STATES CUSTOMS SERVICE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF

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REPLY BRIEF

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1. In *Bowen v. Massachusetts*, 487 U.S. 879, 910 n.48 (1988) this Court explained that Tucker Act jurisdiction is exclusive "only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court." As we explained in our opening brief, under *Bowen*, district courts may assert jurisdiction over Fair Labor Standards Act claims against the United States, independent of the Tucker Act, pursuant to 28 U.S.C. 1331, because the FLSA provides its own waiver of sovereign immunity.

In its opposition (at pp. 5-6), the government seeks to distinguish *Bowen* on the grounds that, although the

plaintiff there sought monetary relief, it did not seek money "damages." As we noted in our petition (at 7, n.4), this distinction is beside the point. *Bowen* discussed the difference between money damages and specific relief because the Administrative Procedure Act, under which the suit in that case was brought, waived the federal government's sovereign immunity only for the latter, and not for money damages. We rely upon a different part of *Bowen* for the proposition that *even if* a plaintiff could obtain money damages under the Tucker Act, he can still have recourse to federal district court where Congress provides an independent basis for such jurisdiction. 487 U.S. at 910, n.48.

With respect to that point, the government asserts (Op. Cert. at 6) that our reliance upon that observation in *Bowen* "involves a false analogy" between the APA and the FLSA. It purports to distinguish *Bowen* on the grounds that there was "no question" that suits against the United States under the APA could be maintained in district court. *Bowen*, the government argues (*id.* at 6-7), involved the issue whether suits involving monetary relief fell within an exception to that rule—"*i.e.* whether the Claims Court's Tucker Act jurisdiction was so exclusive as to limit the jurisdiction that Congress had otherwise granted the district courts." On the other hand, the government contends (*id.* at 7), the question whether FLSA suits against the United States can be pursued in district court is the very question presented in this case.

The government's attempted distinction is meritless. Just as there was no question in *Bowen* that APA suits could be brought in district court pursuant to 28 U.S.C. 1331 because they "arise under" federal law, there is similarly no question that FLSA suits "arise under" a federal statute. Assuming, therefore, the requisite waiver of sovereign immunity, district courts possess jurisdiction over FLSA suits pursuant to 28 U.S.C. 1331, just as they do over APA actions. This Court's observa-

tion regarding the non-exclusive character of Tucker Act jurisdiction in *Bowen* is directly on point.

2. There is also no merit to the government's contention that the FLSA does not waive sovereign immunity. Op. Cert. at 10-12. By its plain language, the FLSA authorizes suit against "any employer (*including a public agency*) in any Federal or State court of competent jurisdiction." 28 U.S.C. § 216(b) (emphasis supplied). Further, pursuant to the 1974 amendments to the FLSA, the Act provides that " 'public agency' means the Government of the United States . . . . and any agency of the United States." 29 U.S.C. 203(x). The definition of an "employee" authorized to sue their employer includes "any individual employed by the Government of the United States in any executive agency." 29 U.S.C. 203(e)(2)(A)(ii). Similar language, used in sue and be sued clause provisions, has been held waive the government's immunity to suit and allow the district courts to assert jurisdiction under 28 U.S.C. 1331.[1]

Even the Federal Circuit below recognized that the FLSA contains a waiver of soverign immunity.[2] The

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[1] In response to this point, the government merely asserts that "sue and be sued" language has been recognized to confer what it calls "a particular type" of immunity waiver. Op. Cert. at 10. That assertion does not take the government far; obviously, the language of the FLSA is not identical to "sue and be sued" language. The FLSA merely subjects the government to suit; it does not authorize it to sue. The crucial point (ignored by the government) is that both the sue and be sued clauses and the FLSA subject the government to suit in "any court of competent jurisdiction." It is that language, we contend (and a number of courts of appeals have held), that allows district courts to assert jurisdiction independent of the Tucker Act, pursuant to 28 U.S.C. 1331.

[2] The Federal Circuit clearly stated below that the FLSA waives the government's immunity to suit and that it had so found in *Zumerling*. Pet. App. 5a, citing *Zumerling*, 769 F.2d at 749. The government's effort (Op. Cert. 11, n.6) to contradict the Federal Circuit's statement and that court's interpretation of its own precedent is strained and unconvincing. Thus, while it is correct

courts (other than the district court below) that have discussed the issue, have similarly plainly recognized that Congress provided the federal government's consent to suit in the FLSA.[3] The only question upon which there appears to be disagreement is whether that waiver of sovereign immunity allows the district court to assert jurisdiction pursuant to 28 U.S.C. 1331, or whether the Tucker Act precludes reliance upon other jurisdictional statutes.

The government's argument in that regard is that 29 U.S.C. 216(b) "does not state *which* court is 'of competent jurisdiction' when the employer is the United States." Op. Cert. 7. That observation, of course, is correct. It does not, however, support the conclusion the government urges—that only *one* court (a court exercising Tucker Act jurisdiction)—can serve as "a court of competent jurisdiction." The FLSA authorizes suit against the government in "*any* court of competent jurisdiction." 29 U.S.C. 216(b) (emphasis supplied). Neither the government nor the Federal Circuit has explained why "it is to the Tucker Act that a court must look to find out what court possesses jurisdiction" (Op. Cert. at 7), when, in fact, 28 U.S.C. 1331 makes the district courts tribunals of "competent jurisdiction."

Similarly unexplained is the government's bald assertion that "in a suit against the *federal government* pursuant to Section 216(b) . . . there is no reason to con-

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that in *Zumerling* the Federal Circuit observed that a waiver of the sovereign immunity of the United States "can be found in the Tucker Act" (769 F.2d at 748), *Zumerling* also recognized that the FLSA creates a right to bring an action seeking money damages against the United States. *Id.* at 749. *Zumerling* ruled that the right to bring an action for money (the waiver of sovereign immunity) must be coupled with a statute endowing the district court with jurisdiction to enforce that right. It then went on to hold (erroneously) that only the Tucker Act conferred jurisdiction.

[3] *See Cosme Nieves v. Deshler*, 786 F.2d 445, 447-50 (1st Cir. 1986), *cert. denied*, 479 U.S. 824 (1986), *Huddleston v. Donovan*, 524 F.Supp. 179, 181 (N.D. Ill.).

strue the term 'court of competent jurisdiction' as extending to courts lacking Tucker Act jurisdiction." Op. Cert. at 11 (original emphasis). In fact, as *Bowen* teaches, there is no reason *not* to construe the term to extend to courts lacking Tucker Act jurisdiction so long as those courts are otherwise tribunals of "competent jurisdiction."

3. In our opening brief, we showed that the Federal Circuit's decision conflicts with *Ward v. Brown*, 22 F.3d 516 (2d Cir. 1994), which found district court jurisdiction under 28 U.S.C. 1331 over federal employee plaintiffs' claims for backpay exceeding $10,000. In opposition, the government admits that *Ward* conflicts with another Federal Circuit decision (*Mitchell v. United States*, 930 F.2d 893 (1991)). Op. Cert. at 7. It attempts to deny a conflict between *Ward* and the Federal Circuit's decision below because the cause of action here arises under the Fair Labor Standards Act, while in *Ward* the employee filed suit under the Administrative Procedure Act. The government suggests that in *Ward*, the claim for backpay was "ancillary" to the plaintiff's challenge to his removal, which arose under the APA. *Id.* at 8. On the other hand, in this case, the government contends, the underlying cause of action is for monetary loss. *Id.*

These contentions are meritless. In fact, the Second Circuit in *Ward* did not concern itself at all with whether the backpay claim there could be characterized as "ancillary" to the plaintiff's challenge to his removal.[4] Instead, its focus was upon whether a statute other than

[4] The government's premise—that the monetary relief sought in *Ward* was somehow more "ancillary," than the monetary relief the employees seek here—is questionable. In both cases, in addition to backpay, the employees seek a prospective change in their employment status. In *Ward*, the employee sought backpay and reinstatement based upon a ruling that his discharge was illegal. Here, the employees seek backpay and a change in their FLSA status from exempt to non-exempt, based upon a ruling that their positions do not fit the legal criteria for exemption.

the Tucker Act provided a grant of subject matter jurisdiction over the monetary claim and whether an independent waiver of sovereign immunity existed.

In any event, the distinction the government identifies is contrived. In *Bowen v. Massachusetts*, this Court explained that Tucker Act jurisdiction is exclusive "only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court." 487 U.S. at 910, n.48. The Court so found because the Tucker Act contains no language suggesting that it displaces an otherwise valid exercise of district court jurisdiction. *Id.* The Court's reasoning—that the Tucker Act does not displace an otherwise valid exercise of jurisdiction by the district court—applies whether a monetary claim can be characterized as "ancillary" to a non-monetary one, or whether money is the sole relief sought in the case. *Ward* conflicts with the decision below because it explicitly rejects the Federal Circuit's central premise—that in suits against the United States seeking monetary relief—only the Tucker Act provides a basis for district court jurisdiction.

In short, because the FLSA (as even the court below agreed) contains an independent waiver of sovereign immunity, the reasoning of *Ward* dictates that a district court can exercise jurisdiction under the federal question statute. *Ward* thus plainly collides with the Federal Circuit's decision here holding that, notwithstanding the FLSA's waiver of sovereign immunity, the Tucker Act provides the exclusive basis for jurisdiction over federal employees' FLSA claims.[5]

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[5] In our opening brief (at pp. 11-12), we showed that finding Tucker Act jurisdiction exclusive would undermine FLSA enforcement because of the Tucker's Act's peculiar venue provisions and its provision for centralized appellate review in the Federal Circuit. We made those points to show the importance of the jurisdictional issue decided by the Federal Circuit, and not, as the

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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government suggests (Op. Cert. at 12), to propose that federal question jurisdiction can be premised upon the desirability of that result.

With respect to appellate review, the government takes issue with our contention that resolution of federal sector FLSA cases requires application of the same principles that the regional circuits apply to private sector cases, so that centralization of review would be counterproductive. It notes that the FLSA "contemplates a separate system of administration in the case of federal employment." Op. Cert. 13, citing 29 U.S.C. 204(f). This observation is misleading; as the D.C. Circuit found in *American Federation of Government Employees v. OPM*, 821 F.2d 761 (D.C. Cir. 1987), the legislative history of the FLSA shows that while Congress intended the Office of Personnel Management to issue FLSA regulations in the federal sector, it intended those regulations and its administration of the FLSA to be consistent with that of the private sector.